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No. 94559-4

# SUPREME COURT OF THE STATE OF WASHINGTON OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Petitioner,

v.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation,

Respondent

ON APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT Honorable Keith C. Harper

# BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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## TABLE OF CONTENTS

			<u>Page</u>
APF	PEND	DICES	ii
TAF	BLE (	OF AUTHORITIES	iii
I.	IDE	NTITY AND INTEREST OF AMICUS CURIAE	1
II.	SUMMARY OF ARGUMENT		
III.	STA	ATEMENT OF THE CASE	2
IV.	V. ARGUMENT		2
	A.	No objection is required to preserve a challenge to flagrant misconduct in closing argument that causes incurable prejudice.	2
	B.	No objection is required to preserve a challenge to a violation of a definitive ruling forbidding a specific type of evidence or argument, and this Court should disapprove contrary decisions.	4
	C.	This Court should affirm the Court of Appeals and reaffirm that objection during closing argument is not always required.	7
V.	CONCLUSION		

## TABLE OF AUTHORITIES

$\underline{\mathbf{Page}(\mathbf{s})}$
<b>Washington Cases</b>
A.C. ex rel. Cooper v. Bellingham Sch. Dist., 125 Wn. App. 511, 105 P.3d 400 (2004)
Bellevue v. Kravik, 69 Wn. App. 735, 850 P.2d 559 (1993)
Carabba v. Anacortes Sch. Dist. No. 103, 72 Wn.2d 939, 435 P.2d 936 (1967)2, 3, 7, 8
Cranford v. O'Shea, 75 Wash. 33, 134 P. 146 (1913)
Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 549 P.2d 483 (1976)
In re Detention of Black, 187 Wn.2d 148, 385 P.3d 765 (2016)
Matter of Lui, 188 Wn.2d 525, 397 P.3d 90 (2017)
Miller v. Kenny, 180 Wn. App. 772, 325 P.3d 278 (2014)
State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988)
State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)
State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012)
State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)
State v. Jones, 185 Wn.2d 412, 372 P.3d 755 (2016)

## TABLE OF AUTHORITIES

	$\underline{Page(s)}$
State v. Navone, 186 Wash. 532, 58 P.2d 1208 (193	36)2, 3
State v. Paul Bunyan Rifle & Sportsman 132 Wn. App. 85, 130 P.3d 414 (2	's Club, Inc., 006)6
State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (199	95)5
State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (198	84)4
State v. Smith, 189 Wash. 422, 65 P.2d 1075 (193	37)5, 6, 8, 9
State v. Sullivan, 69 Wn. App. 167, 847 P.2d 953 (1	993) 6
Teter v. Deck, 174 Wn.2d 207, 274 P.3d 336 (20)	12)2
Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (196	7)2, 3
Court R	ules
Fed. R. Evid. 103(b)	6

# I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defense Trial Lawyers (WDTL), established in 1962, includes more than 750 attorneys who practice civil-defense litigation in Washington. Its purpose is to promote the highest professional and ethical standards for Washington civil-defense attorneys and to serve its members through education, recognition, collegiality, professional development, and advocacy. One important way WDTL represents its members is through amicus-curiae submissions in cases that present issues of statewide concern to Washington civil-defense attorneys and their clients. This case implicates significant concerns for WDTL, particularly regarding the issue of improper closing arguments in jury trials, which can lead to unjustified and unfair verdicts.

#### II. SUMMARY OF ARGUMENT

The rule that a party must contemporaneously object to preserve the ability to challenge an improper closing argument is not absolute. Although a party may not reserve an objection simply to "gamble on the verdict," the general rule is subject to long-established exceptions, including where counsel's misconduct is so flagrant that no instruction could cure the prejudice or where the trial court has ruled that a specific type of improper argument is forbidden. This Court should affirm the Court of Appeals, confirm the sensible and fair principle that objections are not required in all circumstances, and specifically reaffirm the flagrant-misconduct exception.

#### III. STATEMENT OF THE CASE

WDTL adopts the statement of the case in Respondent's Supplemental Brief.

#### IV. ARGUMENT

A. No objection is required to preserve a challenge to flagrant misconduct in closing argument that causes incurable prejudice.

This Court recognized more than 100 years ago that a trial court, in exercising its inherent power to grant a new trial, may do so because of improper closing argument to which counsel did not object if the misconduct was so flagrant that no instruction could have cured the prejudice. *Cranford v. O'Shea*, 75 Wash. 33, 39-42, 134 P. 146 (1913); *see also State v. Navone*, 186 Wash. 532, 537-39, 58 P.2d 1208 (1936). By 1967, this Court considered this exception "well recognized." *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 952-54, 435 P.2d 936 (1967); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967). This Court has repeatedly confirmed the exception's continuing validity. *See, e.g., Matter of Lui*, 188 Wn.2d 525, 562-63, 397 P.3d 90 (2017); *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). *Cf. Teter v. Deck*, 174 Wn.2d 207, 225-26, 274 P.3d 336 (2012) (holding that a party need not move for a mistrial where counsel's misconduct is so flagrant that no instruction can cure the prejudice).

Improper closing arguments include "golden-rule" arguments, "send-a-message" arguments, "conscience-of-the-community" arguments, arguments from personal experience or belief, arguments that either overtly or implicitly encourage the jury to award punitive damages, appeals to

passion or prejudice, attacks on the opposing party or counsel, references to a party's wealth or poverty, or references to matters outside the evidence. Whether an instruction would effectively cure the prejudice from these or other improper arguments depends on the specific circumstances, including the nature and context of the misconduct and its likely effect on the jury. *See State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012); *Navone*, 186 Wash. 538. This Court has held that "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762; *see also Navone*, 186 Wash. at 538 ("Misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.").

This Court's prior civil cases where incurable prejudice was found demonstrate that this is an issue that concerns both plaintiffs and defendants. In *Warren*, an automobile-accident case cited by Respondent Jefferson Transit and other amici curiae, defense counsel argued in closing that the jury should be guided by the "little baby court" that decided at the collision scene not to issue a traffic citation—an argument this Court recognized as "utterly immaterial to the issues submitted to the jury." *Id.* at 517. Reviewing the issue notwithstanding the lack of any objection by plaintiff's counsel, this Court held that defense counsel committed such flagrant misconduct that no instruction could have cured the prejudicial effect, and reversed the defense verdict. *Id.* at 517-18. *See also Carabba*, 72 Wn.2d at 953-54 (reversing defense verdict and holding that incurable prejudice

resulted from defense counsel's argument that the jury's finding the schooldistrict defendant liable would create "a risk of exposure that no one can face hereafter").

The criminal context provides additional examples of incurable prejudice from closing argument. For instance, in State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988), the prosecuting attorney argued that certain witnesses had delayed reporting the defendant's murder confessions to police out of fear based on the defendant's affiliation with the American Indian Movement, which the prosecutor characterized as "a deadly group of madmen" and "butchers that kill indiscriminately." Id. at 506-10. Reversing first-degree murder and attempted first-degree murder convictions, this Court held that the prejudice from the improper argument was incurable. Id. at 509-10. See also State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (reversing a first-degree murder conviction where the prosecutor repeatedly called the defendant a liar, stated that the defense had no case, and implied that defense witnesses were not credible because they were from out of town and drove expensive cars). A curative instruction may be ineffective to overcome the cumulative effect of "repeated improprieties." State v. Case, 49 Wn.2d 66, 72-74, 298 P.2d 500 (1956).

B. No objection is required to preserve a challenge to a violation of a definitive ruling forbidding a specific type of evidence or argument, and this Court should disapprove contrary decisions.

Counsel often use motions in limine in an attempt to preempt the problem of improper closing arguments and objections during closing. In

the context of a ruling prohibiting examination on a subject, this Court held 80 years ago that where a counsel clearly violates such a ruling, "[t]he fact that the question was not objected to is not controlling." *State v. Smith*, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937). Explaining that an objection, even if sustained, may have been "more damaging...than almost any answer" to the improper question, this Court held that, "in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed." *Id.* at 429.

This Court repeated the holding of *Smith* nearly 40 years later, in *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976), a leading case in which this Court approved the still-developing practice of motions in limine on evidentiary issues. *See id.* at 89-92. Citing *Smith*, this Court stated, "Had the [trial] court granted the [plaintiff's] motion [in limine], under the rule of *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937), *no objection would have been necessary* to preserve the right to claim error if the evidence was nevertheless admitted." *Id.* at 92 (emphasis added). This Court led the way on this issue: long after this Court decided *Smith* and *Fenimore*, a 2000 amendment codified a similar

<sup>&</sup>lt;sup>1</sup> Subsequent to *Smith* and *Fenimore*, this Court stated, "When an evidentiary ruling is pursuant to a motion in limine, only *the losing party* is deemed to have a standing objection and need not specifically object at trial to preserve the issue for appeal." *State v. Finch*, 137 Wn.2d 792, 819-20, 975 P.2d 967 (1999) (emphasis in original) (citing *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995)). But that statement was dictum: the trial court in *Finch* expressly required that any further objections on the pertinent issue be made during the trial. Thus, this Court in *Finch* did not silently overrule *Smith*. In the *Powell* decision cited in *Finch*, this Court held that the party losing a motion in limine is deemed to have a standing objection where the judge has made a final ruling; this Court did *not* hold that a party who obtains an order in limine must renew its objection when the order is violated. 126 Wn.2d at 256.

rule in the Federal Rules of Evidence, resolving a split among the federal circuit courts of appeal. FED. R. EVID. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); *see also* Advisory Committee Note to 2000 amendment.

This Court's binding authority obviates the need to adopt a new evidentiary rule in Washington. Nevertheless, contrary to Smith, the Court of Appeals has held in a several cases that a party must renew its objection when counsel violates an order in limine excluding evidence. See State v. Paul Bunyan Rifle & Sportsman's Club, Inc., 132 Wn. App. 85, 96, 130 P.3d 414 (2006) ("A party is obligated to renew an objection to evidence that is a subject of a motion in limine in order to preserve the error for review.") (quoting *Bellevue v. Kravik*, 69 Wn. App. 735, 742, 850 P.2d 559 (1993)); see also State v. Sullivan, 69 Wn. App. 167, 172-73, 847 P.2d 953 (1993). Moreover, Division One of the Court of Appeals has gone so far as to hold that counsel must object to improper closing argument "at the time of the improper remark"—even where the argument violates an order in limine so plainly that "[n]o one can seriously argue to the contrary." A.C. ex rel. Cooper v. Bellingham Sch. Dist., 125 Wn. App. 511, 525-26, 105 P.3d 400 (2004). This Court should expressly disapprove these decisions and confirm that a definitive ruling obviates the need for contemporaneous objection, including during closing argument.

This Court should confirm that *Smith* remains binding precedent.

And although the exception this Court recognized in *Smith* applies most

often in the context of exclusion of evidence, it should apply with equal if not greater force where the trial court has definitively forbidden a specific type of argument prior to closing. *See Miller v. Kenny*, 180 Wn. App. 772, 816-17, 325 P.3d 278 (2014) (holding that an order banning golden-rule arguments did not excuse the defendant from contemporaneously objecting to improper closing argument "[u]nder these circumstances," *i.e.*, where the specific argument made was outside the scope of the order). Like the flagrant-misconduct exception, this exception relieves parties of the "impossible dilemma" of choosing in the heat of the moment between making an objection that will draw attention to the improper argument or waiving a challenge to an argument notwithstanding its clear impropriety and potential for prejudice. *Carabba*, 72 Wn.2d at 954.

# C. This Court should affirm the Court of Appeals and reaffirm that objection during closing argument is not always required.

In his brief to the Court of Appeals and in his supplemental brief to this Court, Mr. Gilmore has cited two of this Court's decisions for the proposition that the lack of a prompt objection is "strong evidence that counsel perceived no error." Suppl. Br. at 6 (citing *In re Detention of Black*, 187 Wn.2d 148, 154, 385 P.3d 765 (2016)); Respondent's Br. at 20 (citing *State v. Jones*, 185 Wn.2d 412, 426-27, 372 P.3d 755 (2016)). But neither of those cases involved misconduct during closing argument. In fact, both involved the far different context of criminal defense counsel's failure to object based on the defendant's right to be present at all critical stages of a trial.

The notion that one must always object to improper closing argument, or that the absence of an objection indicates counsel perceives nothing improper, is contrary this Court's precedent established in *Cranford*, Smith, and their progeny. Objections during closing are disfavored by juries, risk that the trial judge did not hear or interpret the argument in the same manner as counsel and, regardless, ultimately draw attention to the improper argument. Counsel who do not object in the face of counsel's flagrant misconduct do not improperly "gamble on the verdict." This Court has held that to balance prejudicial misconduct against the concept of "gambling on the verdict" would put appellants "on the horns of an impossible dilemma." Carabba, 72 Wn.2d at 954. The occurrence of misconduct during closing argument, resulting in incurable prejudice, "removes any element of discretion from the trial court so far as a new trial is concerned." Case, 49 Wn.2d at 74. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." Id.

In this case, Mr. Gilmore's counsel repeatedly crossed the line during closing argument in accusing Jefferson Transit of perpetrating a fraud in the courtroom, accusing defense counsel of misleading the jury, accusing "the government" of "murder[ing] innocent people" and "get[ting] away with it," encouraging the jury to punish Jefferson Transit, and calling upon the jury to help Mr. Gilmore "fight the government." The Court of Appeals correctly recognized these statements and others like them as

within the exception for flagrant misconduct causing incurable prejudice, such that a fair trial was denied.

#### V. CONCLUSION

This Court should affirm the Court of Appeals and reaffirm the principles articulated in *Cranford*, *Smith*, and progeny by holding that an objection to improper closing argument is not required in all circumstances, including where counsel violates a definitive ruling or where flagrant misconduct causes incurable prejudice.

Respectfully submitted this 4th day of December, 2017.

CARNEY BADLEY SPELLMAN, P.S.

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Defense Trial Lawyers

#### **CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this day of December, 2017.

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